

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

FILED

APR 27 2009

CLERK, U.S. DISTRICT COURT
NORFOLK, VA

RICKY DONNELL NELSON, #312831,

Petitioner,

v.

ACTION NO. 2:08cv349

GENE M. JOHNSON, Director of the
Virginia Department of Corrections,

Respondent.

FINAL ORDER

This matter was initiated by petition for a writ of habeas corpus under 28 U.S.C. § 2254. The petition alleges violation of federal rights pertaining to Petitioner's conviction on March 10, 2003, in the Circuit Court of the City of Fredericksburg, Virginia, for distribution or possession with intent to sell cocaine, as a result of which he was sentenced to serve five (5) years in the Virginia penal system.

The matter was referred to a United States Magistrate Judge pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and (C), Rule 72(b) of the Federal Rules of Civil Procedure and Rule 72 of the Rules of the United States District Court for the Eastern District of Virginia for report and recommendation. The report of the Magistrate Judge (Magistrate Judge's Report) was filed on March 31, 2009, denying Petitioner's motion for an evidentiary hearing

and recommending dismissal of the petition.¹ By copy of the report, each party was advised of his right to file written objections to the findings and recommendations made by the magistrate judge. On April 10, 2009, the Court received Petitioner's Objections to the United States Magistrate Judge's Report and Recommendations. The Court received no response from Respondent.

The Court, having reviewed the record and examined the objections filed by Petitioner to the Magistrate Judge's report,² and having made de novo findings with respect to the portions objected to, does hereby ADOPT AND APPROVE the findings and recommendations set forth in the report of the United States Magistrate Judge filed on March 31, 2009, and it is, therefore, ORDERED that the petition be DENIED AND DISMISSED and that judgment

¹ The Magistrate Judge's Report recommended dismissal of the petition because Claims 1 and 4 were not cognizable, Claims 2 and 5 were procedurally defaulted, and Claim 3 was without merit.

² Petitioner makes three clear objections. Regarding the first objection, that the Magistrate Judge misconstrued the grounds Petitioner stated in Claims 1 and 4, a close reading of the petition finds this objection to be without merit. Second, Petitioner objects to the Magistrate Judge recommending dismissal of Claim 3 because Petitioner believes the recommendation is based on an unreasonable determination of the facts in the state court proceeding at trial and on direct appeal. Petitioner's objection is without merit because it misunderstands the standard stated in 28 U.S.C. § 2254(d). Third, Petitioner argues that Claims 2 and 5 are not procedurally defaulted; these arguments are also without merit. Because Petitioner's Claims 2 and 5 are procedurally defaulted, the Report and Recommendation did not address the merits of Petitioner's claims, and the Court sees no reason to do so here.

be entered in favor of Respondent.

Petitioner may appeal from the judgment entered pursuant to this final order by filing a written notice of appeal with the Clerk of this Court, United States Courthouse, 600 Granby Street, Norfolk, Virginia 23510, within thirty (30) days from the date of entry of such judgment. Petitioner has failed to demonstrate "a substantial showing of the denial of a constitutional right." Therefore, the Court, pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure, declines to issue a certificate of appealability. See Miller-El v. Cockrell, 537 U.S. 322, 335-36 (2003).

The Clerk shall mail a copy of this Final Order to Petitioner and to counsel of record for Respondent.

AB JM

Jerome B. Friedman
United States District Judge

UNITED STATES DISTRICT JUDGE

Norfolk, Virginia

April 27, 2009